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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE

UNITED STATES

NO: 82-5920

KEVIN MICHAEL SHEA

Petitioner,

versus

STATE OF LOUISIANA

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA ON BEHALF OF RESPONDENT, STATE OF LOUISIANA

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QUESTION PRESENTED

Whether the rule set forth in Edwards v. Arizona, 451 U.S. 477, 68 L.Ed.2d 378, 101 S.Ct. 1880, rehearing denied U.S., 69 L.Ed.2d 984, 101 S.Ct. 3128 (1981), applies retroactively to previously decided cases. That rule states: upon the invocation of his right to counsel by an accused, a valid waiver of the right to counsel cannot be established by showing that he responded to a police-initiated custodial interrogation even though he has been advised of his rights as per Miranda.

STATEMENT OF THE CASE

On July 2, 1979, Kevin Michael Shea was arrested for the crime of armed robbery of Tony Tuminello at his Phillips 66 station in Shreveport, Caddo Parish, Louisiana. Michael Shea was arrested within a few blocks of the scene of the crime. He was taken to the Shreveport Police Station and advised of his Miranda rights.

At this time, Michael Shea told police that he did not want to make any statements until he had seen a lawyer and the interview was terminated at that point.

On July 3, 1979, Michael Shea was about to be transported to the Caddo Parish Prison, a larger holding facility, when he was approached by a detective and asked if he wanted to talk about the case. There was no inquiry as to whether or not he had obtained counsel.

Michael Shea was again advised of his rights and, thereafter, gave a brief oral statement to the detectives admitting that he and his companion had robbed Mr. Tuminello. At the trial of the case, the defendant testified that he had repeated his desire for a lawyer before he gave his inculpatory statement. Additionally, he said that he was told by the detectives that they already knew everything and it would be better for him to cooperate. This allegation was denied by the detectives and they further stated that they never promised Mr. Shea anything on this occasion.

At the trial of this case in April of 1980, and on appeal to the Louisiana Supreme Court, Michael Shea objected to the introduction of the oral statement on the grounds

that the statement had been obtained in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution, as set forth by the Supreme Court of the United States in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In its original decision dated January 25, 1982, the Louisiana Supreme Court recognized that there was a violation of the additional standard (emphasis added) governing police interrogation of a suspect imposed by Edwards v. Arizona, supra. However, the Louisiana Supreme Court found that this standard of police interrogation is a new procedural rule and, therefore, should not be applied retroactively. Johnson v. State of New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966), rehearing denied, 385 U.S. 890, 87 S.Ct. 12, 17 L.Ed.2d 121; and United States v. Johnson, ____ U.S. ____, 102 S.Ct. 2579 (1982).

On October 18, 1982, the Louisiana Supreme Court reviewed the matter on rehearing on the issue of retroactivity and held that the Edwards case, supra, should not be applied retroactively. From this decision, Michael Shea has applied to this court for writs of certiorari.

REASONS FOR DENYING THE APPLICATION FOR WRIT OF CERTIORARI

The petitioner cites several cases which refer to the conflicts between the states on the issue of the retroactivity of the Edwards decision, supra. However, a close analysis of the opinion issued in the Edwards case, supra, clearly shows that this court did set forth new safeguards regarding the waiver of the right to counsel by an accused.

In Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 Ohio Misc. 9, 36 Ohio OPS 2d 237, 10 A.R 3d 974 (1976), this court held that the Fifth and Fourteenth Amendments prohibited compelled self-incrimination during custodial interrogation which was not preceeded by advice to the defendant that he has the right to remain silent and the right to the presence of an attorney during interrogation.

Therefore, Miranda, supra, held that a defendant in custody must be advised of certain constitutional rights prior to custodial interrogation. In dicta, the court further stated that these rights could be waived.

In Edwards v. Arizona, supra, this court addressed the issue: what constitutes a valid waiver of a defendant's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. At p. 386 this court stated:

> ...the court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to

> further police initiated interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused initiates further communication, exchanges or conversations with the police.

Clearly, the majority decision sets forth a new procedural rule that the police must follow. Now the police cannot re-initiate interrogation of an accused once he has invoked his right to counsel. If the police do re-initiate such interrogation, then there can be no valid waiver by an accused of his constitutional rights.

In concurring opinions, Chief Justice Burger, Justice Powell and Justice Rehnquist agreed with the results, but expressed concern over the rigid per se rule.

The Louisiana Supreme Court recognizedthat this holding declared a new rule and correctly determined that Edwards, supra, should not be given retroactive effect. The court noted in Footnote 8 that the ruling of the Edwards' court was unanticipated. Thus the Louisiana Supreme Court correctly held that the Edwards decision was breaking new ground in the area of police procedure and should not be applied retroactively. The principal reason that it is a new rule is that the court no longer will examine the totality of the circumstances in determining a valid waiver of rights.

CONCLUSION

The question: whether the Edwards decision should be applied retroactively has not been addressed by this court, The decision by this court in Edwards pronounced a new rule about how courts must determine whether an accused has waived his constitutional rights during custodial interrogation. It is a per se rule thatdoes not allow collateral inquiry. The respondent respectfully suggests to this court that for this reason the decision in Edwards should not be applied retroactively. Therefore, the application for writ of certiorari should be denied.

Respectfully submitted,

DALE G. COX
ASSISTANT DISTRICT ATTORNEY

C E R T I F I C A T E

I HEREBY CERTIFY that a copy of the foregoing brief has been furnished to Mr. Don Minor, counsel for petitioner, 311 Slattery Building, Shreveport, Louisiana, 71101, this 4th day of March, 1983.

DALE G. COX

Supreme Court of the United States

No. 82-5920

Kevin Michael Shea,

Petitioner,

v.

Louisiana

ON CONSIDERATION of the motion for appointment of counsel,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted and it is ordered that Frances Baker Jack, Esq., of Shreveport, Louisiana, is appointed to serve as counsel for the petitioner in this case.

June 11, 1984